1952 *Present :* **Swan J.**

HINNIAPPUHAMY, Appellant, *and* WILISINDAHAMY, Respondent

*S. C. 461—M.C. Galle, 1947*

*Maintenance Ordinance (Cap. 76)—Order for maintenance of child—Extension of such order—Scope of—Right of appeal—Sections 2, 7 and 17.*

**Appeal lies from an order made under the proviso to section 7 of the Maintenance Ordinance extending the period of maintenance in respect of a child to eighteen years.**

**A Magistrate has no jurisdiction to extend the period of maintenance if the child has passed the age of sixteen on the date when the application for extension is made.**

APPEAL from a judgment of the Magistrate's Court, Galle.

*M. L. S. Jayasekere*, with *W. P. N. de Silva*, for the defendant appellant.

*A. W. W. Goonewardene*, with *T. Velupillai*, for the applicant respondent.

*Cur. adv. vult.*

November 17, 1952. SWAN J.—

Learned Counsel for the respondent has raised a preliminary objection to this appeal, to wit, that no appeal lies. In this connection he has referred me to Section 17 of the Maintenance Ordinance which provides as follows :—

> " Any person who shall be dissatisfied with any order made by a Magistrate under Section 2 or 14 may prefer an appeal to the Supreme Court in like manner as if the order was a final order pronounced by a Magistrate's Court in a criminal case or matter, and Sections 338 to 352 (inclusive) of the Criminal Procedure Code shall apply to such appeal. "

His contention is that the order was made under Section 7 from which no appeal is allowed. Section 7 is worded thus :—

> " No order for an allowance for the maintenance of any child legitimate or illegitimate, made in pursuance of this Ordinance shall except for the purpose of recovering money previously due under such order, be of any force or validity after the child in respect of whom it was made has attained the age of sixteen years, or after the death of such child :
>
> Provided that the Magistrate may *in the order or subsequently* direct that the payments to be made under it in respect of the child shall continue until the child attains the age of eighteen years, in which case such order shall be in force until that period. "

In my opinion a subsequent order made under the proviso to Section 7 is, in effect, an order made under Section 2 and an appeal lies therefrom. There can be no question that if, in the first order made, the time is extended to eighteen years the party dissatisfied has a right of appeal on

every matter involved in the order—so that if by a subsequent order the Magistrate extends the period to eighteen years I think that an appeal lies against the extension. In any event this Court has power to deal with such an order in revision and this, I think, is an appropriate case for the exercise of revisionary power.

The applicant obtained on 10.9.1951 an order of maintenance for herself and her child Jinadasa. On 31.3.1952 the case was called on a question of arrears. On that date the Proctor for the applicant moved that the order in favour of the child should continue till he attained the age of eighteen. A birth-certificate was produced which showed that Jinadasa was born on 9.12.1935. The learned Magistrate made order allowing the extension asked for.

The point to decide is whether the Court had jurisdiction to extend the order on that date because it is obvious that on 31.3.1952, Jinadasa had passed the age of sixteen.

In the case of *Dona Rosaline v. Gunasekera* [1] Garvin A.C.J. was confronted with a similar situation. It was an order made under the Ordinance after the age limit was raised from fourteen to sixteen. In the original order no time limit was fixed so that by operation of Section 7 the order expired, or in other words ceased to exist, when the child attained the age of fourteen. Some time later the applicant moved under the Amending Ordinance, which *inter alia* raised the limit from fourteen to sixteen and added the words "*and subsequently*" to the proviso to Section 7, that the order be extended till the child attained the age of eighteen. The Ordinance before it was amended empowered a Magistrate to make the order until the child was eighteen, but as the Section was then worded, the limit had to be fixed "*in the order*". In the result the order in that case ceased to have any force or validity after the child attained the age of fourteen. This event had taken place before the Amendment came into operation. The learned Acting Chief Justice held that a Magistrate can extend an existing and enforceable order but cannot impose a fresh liability on a person whose original liability to pay maintenance had expired. In the case of *Thangayam v. Chelliah* [2] Soertsz J. held that a first application for a child could be made after it had attained the age of sixteen. "If", observed His Lordship, "a Magistrate is empowered, in the first instance, to order maintenance until a child attains its eighteenth year there does not appear to be any good reason why a first application for maintenance could not be made between the age of sixteen and eighteen". The case of *Dona Rosaline v. Gunasekera* (2upra) was cited to Soertsz J. and he distinguished the facts from those with which he was dealing ; but he did not in any manner express disagreement with or doubt the correctness of the view taken by Garvin A.C.J. With that view I entirely agree. From the plain and unmistakable language of Section 7 no other view seems possible. In my opinion the order of the learned Magistrate on 31.3.1952 directing the appellant to pay maintenance for Jinadasa till he attained the age of eighteen was clearly *ultra vires* and I set it aside.

The appeal is allowed but in the circumstances I make no order as to costs.

*Appeal allowed.*

[1] *(1926) 13 C.L.W. 17.*

[2] *(1941) 42 N.L.R. 379.*